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ABSTRACT

Censorship has become a significant problem for public school libraries and has been addressed in several court cases, including Pico v. Island Trees Board of Education, the first such case to be heard by the Supreme Court. In this case, to be decided in the summer of 1982, the school board voted to remove a group of books from school libraries, despite the recommendations of a committee appointed by the board, on the basis of charges raised against the books by a conservative parents' organization. From a review of the major earlier cases it would appear that the most equitable and efficient approach to the book removal controversy involves balancing the student's right to receive information with the school board's right to select curricular materials free from judicial intervention. (Author/PGD)

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SCHOOL PUBLIC LIBRARY CENSORSHIP AND THE FIRST AMENDMENT

by

Paul Kimmelman

April 22, 1982

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SCHOOL PUBLIC LIBRARY CENSORSHIP
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FIRST AMENDMENT

I. INTRODUCTION

General Overview of Censorship in Public Education

The banning of books is not a phenomenon new to society. In fact it has been reported that as early as 387 B.C. Plato suggested that "Homer" be expurgated for immature readers.[1] Thus the issue has persisted and been debated up to and including the removal of library books from junior and senior high schools in Island Trees, New York.[2]

Censorship in the modern world has rather generally ceased to be a systematic social practice, particularly in the Western nations.[3] Private groups and public authorities in various parts of the country are working to remove books from sale, to censor textbooks, to label controversial books, to distribute lists of objectionable books or authors and to purge libraries.[4]

Censorship in America's public schools has become a controversial issue and of rising national concern. In recent years, reports from educators, librarians, and the press, from all sections of the country, have told increasingly of attempts to challenge or restrict the books and teaching materials available to students in the school library. These reports indicated that the pressures have come from pressure groups supporting both the left and right philosophies of the political spectrum, individual parents, organized special-interest groups, and sometimes from educators.[6]

The National School Public Relations Association has a proposed position statement on censorship before its Executive Board.[7] The statement reads:

> The National School Public Relations Association opposes the arbitrary removal of instructional materials and books from school libraries and classrooms. The Association encourages school boards to adopt appropriate policies establishing professional and equitable procedures for the selection, challenge,[8] and review of educational materials.

The American Library Association has adopted and amended its "Library Bill of Rights" which deals with controversial library materials. It reads:

> LIBRARY BILL OF RIGHTS
>
> The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services.
>
> 1. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation.
>
> 2. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.
>
> 3. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.
>
> 4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

5. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.

6. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

Adopted June 18, 1948

Amended February 2, 1961, June 27, 1967, and January 23, 1980

by the ALA Council.[9]

The American Library Association provides a variety of materials to assist librarians with censorship questions. One particular document, Workbook for Selection Policy Writing, provides a comprehensive procedure for selection and challenge for library materials.[10]

A recent Ohio School Boards' publication, Focus, cautioned school board members in Ohio that it "may not be worth the time and effort to those considering the removal of a book or magazine from the library shelf. It could prove to be embarrassing, tiresome, and costly".[11]

The impact of censorship was researched by a joint study sponsored by the Association of American Publishers, the American Library Association, and the Association for Supervision and Curriculum Development.[12] In summary, it was discovered that:

1. one in five of the 1,891 respondents overall, or nearly one administrator in five and nearly one librarian in three, reported that there had been some challenge to classroom or library materials in their schools since September 1, 1978.[13]

2. the percentages of respondents reporting challenges were fairly consistent across all regions of the country.[14]

3. challenges were reported by respondents in schools with populations drawn from all types of communities.[15]

4. of 510 respondents, almost one in three said that recent challenges had resulted in changes in materials used or in the educational process or environment.[16]

5. on the local level, by far the most frequently challenged aspects had to do with sex, sexuality, obscenity, and objectionable language.[17]

Dr. Edward Jenkinson, an author of several censorship articles, recommends several tactics for educators.[18] They are:

1. launch a public relations campaign that explains what education is about, courses, methods, and total curriculum[19]

2. admit that we (educators) have problems, i.e., violence and vandalism in schools and seek advice from parents[20]

3. involve parents in decisions about textbooks and curriculum[21]

4. join forces with as many people as we (educators) can to talk with the protestors, to try to reason with them, and to make the community aware of the nature of their protests.[22]

The possible cause for school material censorship was cited by Stephen Arons in his article, "The Crusade to Ban Books".[23] Arons noted that campaigns of intolerance have been aimed at schools to prevent teenagers from being exposed to ideas that challenge their thinking and that this may have resulted from the sociological transition in American life.[24]

Fred Hechinger, education editor for the New York Times, noted that most experts cite the increase in censorship is due to:[25]

1. the far greater range of what is read and discussed in today's classrooms compared with many of the parents' own school experiences.[26]
2. the parents' lack of familiarity with contemporary literature leading to complaints that books used in school are "anti-Christian, anti-parents, anti-government, immoral and obscene".[27]
3. the proliferation of groups that resort to censorship to further their political goals and ideology.[28]

According to Naylor, the schools in this nation have been embroiled in controversy during their three-and-one-half centuries of existence.[29] Central to those conflicts have been issues concerning what is to be taught and how it is to be taught.[30]

Many Americans regard the public schools as having the primary function of maintaining the status quo and no discussion of censorship can ignore this concept, as well as the fact that people are divided

in the concept about the nature and purpose of the public schools.[32]

Few censors, if any, tend to see that censorship itself runs counter to certain basic American values.[33] In Warsaw, Indiana, 40 copies of "Values Clarification" were publicly burned bringing the comment from a board of education member, "The bottom line is: Who will control the minds of the students?"[34]

How instructional and library materials are selected and removed from public schools, What impact do efforts to restrict the content of such materials have on the educational environment, Do such efforts jeopardize the educational process that is so vital to a democracy, and, if so, how can their negative effects be minimized are major questions for public education according to Michelle Kamhi,[35] research consultant for the joint study sponsored by the Association of American Publishers, the American Library Association, and the Association for Supervision and Curriculum Development.[36]

In quoting an article from the Detroit News Dorothy Beardmore referred to the landslide election of Ronald Reagan which included the potential for change in U.S. politics and policies. One of the changes "could" include the potential for censorship of reading materials.[37] (It should be noted that Ms. Beardmore is a board of education member in Michigan.)

Armed with sophisticated lobbying techniques and backed by such national organizations as Moral Majority, the Eagle Forum, and the Christian Broadcasting Network, parents are banding together to remove books from libraries, replace textbooks, and balance lessons of evolution with those of Biblical creation according to Dena Kleinman in an article

for the New York Times.[38]

A national publication for school principals, "Middle School/Junior High Principal's Letter", stated that "textbook selection has become an issue like it never was before".[39] Administrators should consider it an issue for inservice sessions, private study, and team action because they will frequently be the ones "caught in the crossfire when the battle lines are drawn".[40]

The National Coalition Against Censorship advises librarians on how to resist censorship. According to the N.C.A.C. libraries or all sizes and types continue to be targets of pressure from groups and individuals who wish to use the library as an instrument of their own tastes and views.[41] To combat censorship efforts, the N.C.A.C. recommends that every library take certain measures to clarify policies and establish community relations.[42]

In a position statement, the American Civil Liberties Union notes that one of the objectives of universal free public education is to develop in children the intellectual capacities required for the effective exercise of the rights and duties of citizenship. Experience demonstrates that this is best accomplished in an atmosphere of free inquiry and discussion which is, in turn, supported by effective selection and use of instructional materials.[43]

In addition to the increasing pressure from the public over library materials, filmstrips have also been a concern to the public.[44] While researching the legal aspects of censorship of public school library and instructional materials Elizabeth Detty discovered that public

schools have been faced with more censorship problems and litigation concerning censorship during the past two decades than ever before.[45] Dr. Detty noted that, "The current political, social, and moral climate is central to understanding the problem."[46]

The censorship question has usually been based on eight recurrent themes. Hung listed them as:

1. Profanity, blasphemy and un-Christian thoughts;
2. Indecency--most related to sexual language, nude pictures, explicit sex descriptions;
3. Drug use or encouragement;
4. Radical liberalism;
5. Bias--sexist or racist ideas in language;
6. Undermining the family, society, human relationships, and traditional values;
7. No educational value, objectionable content;
8. Secular humanism and values revisionism.[47]

Between 1966 and 1975 the Office of Intellectual Freedom of the American Library Association reported over 910 censorship cases in United States educational institutions, 40 on the elementary level, 77 junior high, 386 high school, 64 affecting all levels, K-12, and the remainder involving public libraries, colleges, and universities.[48] Approximately two-thirds of all the censorship attempts were successful resulting in the banning of materials from schools or restricted access.[49]

As a result of the censorship issue in education the American

Association of School Administrators and the American Library Association established a telephone "hotline" for school officials with questions about censorship in the schools.[50]

Even dictionaries have been banned by censors in some schools.[51] In Texas five dictionaries were banned because of "bad" words.[52]

It is apparent that censorship has become a significant problem for public school libraries. A variety of educational journals have addressed this issue citing both "pro" and "con" positions. While these positions are for the most part opinionated, the question of censorship and public school libraries has been addressed by the courts and already been heard by the Supreme Court in Pico v. Island Trees Board of Education.

II. LEGAL BACKGROUND

A. Introduction

The fact that Article I of The Constitution of the United States of America reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" has not enabled school or public library officials to determine the legality of "censorship" of materials.[53] The First Amendment's guarantee of freedom of speech appears on its face to grant an absolute protection against any restrictions on freedom of speech yet it has never been given literal force.[54] The central issue surrounding the First Amendment has been the extent to which the court will protect the

individual expression.[55]

In a number of decisions during the 1960's the Supreme Court emphasized society's duty to protect or safeguard individual rights.[56] The Court stressed that the judiciary should refrain from becoming embroiled "in the resolution of conflicts which arise in the daily operation of school systems,"[57] yet it became clear that it (the Court) would not tolerate arbitrary interference with basic constitutional rights.[58]

Traditionally local school boards have enjoyed almost exclusive control over public education within their districts.[59] The school board authority included matters such as control over curriculum and student conduct.[60] Due to the large number of people involved in the public school system there is a need for a central body to set policy and promulgate administrative rules to implement this policy.[61]

B. Academic Freedom

One of the first significant restrictions placed on state control over education was imposed by the Supreme Court in Meyer v. Nebraska.[62] In this instance a state statute prohibited the teaching of foreign languages to students below the ninth grade level. The Supreme Court held that the statute violated the due process clause of the Fourteenth Amendment since it arbitrarily and impermissably interfered with the calling of language teachers and with the opportunities of students to obtain knowledge.[63] While the court acknowledged the desirability of the statute's purpose, it indicated that such a goal could not be effectuated

at the expense of fundamental individual rights.[64] Thus it became evident at an early date that state legislation concerning public education was not absolute and could not conflict with the Constitution.[65]

Subsequent to Meyer the Court held unconstitutional a flag salute rule promulgated by the state board of education in Barnette v. West Virginia State Board of Education.[66] In so holding, the Court recognized the rule of the First Amendment in preserving individualism and cultural diversity in our society and stated that fundamental rights cannot be made subordinate to the whims of the majority.[67] In decisions following Barnette v. West Virginia State Board of Education the Court continued to hold that the state retained broad discretion to regulate educational affairs.[68]

The next phase in the evolution of academic freedom cases dealt with loyalty regulations. In most instances the loyalty oaths were being used to keep public educational systems free of communists and subversives.[69] In Weiman v. Updegraff[70] the Court held that the oath (loyalty) offended due process since it indiscriminately penalized "innocent" along with "knowing" activity.[71]

In Sweezy v. New Hampshire[72] the Court reversed the contempt conviction of a college professor who refused to answer questions by the Attorney General of New Hampshire concerning his (Attorney General's) investigation of subversive activities.[73] The opinion stressed the rights of both students and teachers to inquire, study, and evaluate.[74]

In 1967 the Supreme Court again gave strong support to academic freedom in Keyishian v. Board of Regents.[75] In Keyishian the majority

held that New York's loyalty oath was unconstitutionally vague, and further commented that "[o]ur Nation is deeply committed to safeguarding academic freedom".[76]

Thus the loyalty cases are important in that they indicate express recognition by the Supreme Court of the concept of academic freedom[77] and although the cases primarily involved teachers, the Court extended the rights involved to students as well in dicta.[78]

The notion of academic freedom, or freedom from governmental and ideological coercion in the schools embodies a recognition of the right of the teacher to teach, conduct classroom discussion, and carry on research without fear of unwarranted governmental intervention.[79] Although the academic freedom of students has not been specifically addressed, the Supreme Court has stated that the Bill of Rights is not for adults alone[80] and students do have constitutional rights within the school environment.[81]

In Tinker the Court recognized the authority of school officials to control conduct in school, but stated that the authority could not infringe on the students' rights of freedom of speech and peaceful protests as long as their activities did not substantially and materially interfere with school discipline in the operation of the school.[82] Significantly, the Court (in Tinker) rejected the argument that mere apprehension of physical disturbance or a desire to avoid ideological controversy, was sufficient justification for restricting the students' freedom of expression.[83]

Another decision of note involving academic freedom was Epperson v.

Arkansas.[84] Although the Court held that the law (an Arkansas state statute which prohibited the teaching that man evolved from other species of life) unconstitutional, the rationale for the decision "seemed" to be directed to the right of academic freedom.[85]

The Tinker and Epperson decisions are important to the issue of censorship in public school because of the Court's recognition of first amendment protections from school board interference.

C. The Right to Know

One final concept (in addition to general constitutional freedoms of expression and academic freedom) of importance to the issue of censorship in public schools is the "right to know". The book removal problem concerns the right of students to receive information which they and their teachers desire them to have.[86] The right of the recipient to receive information and ideas has been loosely termed the "right to know" by Mr. Justice Douglas.[87]

The Supreme Court laid the foundation for the Constitutional right to receive information in Martin v. City of Struthers.[88] The Court in this instance ruled that an ordinance prohibiting door-to-door distribution of religious leaflets was invalid and that the freedom of expression includes within its parameters both the right to distribute and receive literature.[89]

The right to receive information surfaced again in Lamont v. Postmaster General.[90] Although the majority decision did not expressly rely upon the First Amendment right to receive information, it noted that the

dissemination of ideas is ineffective if willing individuals are not free to receive desired publications.[91]

Four years after Lamont, in Stanley v. Georgia[92] the Court ruled that freedom of speech necessarily guarantees the right to receive "information and ideas, regardless of their social worth."[93] It should be further noted that the Court found that the state's attempt to control the moral content of an individual's thoughts was incompatible with the underlying principles of the First Amendment.[94]

In a case heard shortly after Stanley, Red Lion Broadcasting Company v. F.C.C.,[95] Justice White speaking for a unanimous Court found that the public's right to receive information encompasses the right of access to desired information and ideas.[96]

The Court decided three cases during the 1970's that were relevant to the public school book removal controversy. The first case, Kleindienst v. Mandel,[97] dealt with the question of whether the United States Attorney General could be forced to grant a temporary visa to a foreign journalist so that he could enter the country to participate in a series of university lectures and conferences. Although the Court refused to force the Attorney General to grant the visa it recognized in dictum that the First Amendment right to receive information was particularly salient in the academic community.[98] The dictum noted, "[i]n a variety of circumstances this Court has referred to a First Amendment right to receive information and ideas'. . .[T]his right is nowhere more vital than in our schools and universities."[99]

In 1974, the Court addressed the reciprocal nature of communication, observing that communication "is effected only when the letter (prisoner mail) is read by the addressee;" therefore "censorship of the communication between them (the prison and the nonprisoner) necessarily impinges on the (First Amendment) interests of each."[100] (Procunier v. Martinez)[101]

In the final case relevant to this topic, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.[102] the Court expanded the right to receive information to include commercial speech by invalidating a state statute that designated as unprofessional conduct advertising of prescription drug prices by licensed pharmacists.[103] Mr. Justice Blackman speaking for the Court said, "[f]reedom of speech presupposes a willing speaker but where a speaker exists. . .the protection afforded is to the communication, to its source and to its recipients both."[104]

The "right to know" and academic freedom concepts are important when reviewing the constitutionality of removing books from a public school library. The aforementioned cases indicate that in certain situations one has the right to teach without arbitrary interference from a legislative body and the right to receive information.

D. Book Removal Cases

At the present time there is a case concerning book removals from a public school library before the Supreme Court.[105] It was heard on March 2, 1982, but the verdict has not been rendered. The nearest the Court has come to addressing the topic was Epperson v. Arkansas,[106]

when it (Court) noted that, "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[107]

It should also be noted that the Court has said, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,"[108] Shelton v. Tucker.

Also noted by the Court was "the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom"[109] Keyishian v. Board of Regents.

While these cases support the premise that local school authorities are responsible for operating and controlling schools, they do cast a warning that the control is not unlimited and violation of constitutional rights or requirements will not be permitted.[110]

President's Council District 25 v. Community School Board No. 25[111] was the first case to consider whether a school board could remove books from a school library. In this instance the Board voted to remove Piri Thomas's "Down These Mean Streets" from junior high school libraries.[112] The book (Down These Mean Streets) was chosen for the library in order to expose the students to an environment quite different from their own.[113]

The facts of the case are as follows: At an executive board session the school board voted to remove all copies of the book (Down These Mean Streets) from the district's junior high school libraries. A few

months later the Board modified its action by permitting the book to be retained at schools that already had it (the book) but required that it be loaned only to parents who could then determine whether it was appropriate for their children to read.[114]

The Board's action of restricting access to the book was challenged by parents, students, and teachers of the district as violative of their First Amendment rights.[115]

Neither party disputed that the Board had been properly delegated authority by the state to select books and instructional materials for schools.[116]

In ruling the Second Circuit noted, "The administration of any library, whether it be a university or particularly a public junior high school, involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing a curtailment of freedom of speech or thought is a proposition we cannot accept.[117]

Part of the Court's rationale for its finding was that it predicated that the choice of books to be in a library would never be a harmonious one. Further, there was no showing of a curtailment of freedom of speech or thought itself since the topic of barrio life in New York City of the book itself could still be discussed.[118]

Following President's Council was Minarcini v. Strongsville City School Board.[119] This case involved a First Amendment claim under the Civil Rights Act similar to the claim in President's Council and was

brought by five high school students through parents as next friends.[120]

The facts in this case included the board of education passing a resolution to remove Heller's Catch 22 and Vonnegut's Cat's Cradle from the school library.[121] No official reason was given for the removal and the only apparent explanation was contained in the minutes of the board meeting in which the books were described as "completely sick" and "garbage".[122]

Unlike the Second Circuit in President's Council, the Sixth Circuit recognized the distinction between the removal of a shelved book and a book that has not yet been selected.[123] "In the absence of any explanation of the Board's action which is neutral in First Amendment terms, we must conclude that the School Board removed the books because it felt that it had the power unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful".[124]

"Neither the State of Ohio nor the Strongsville School Board was under any federal constitutional compulsion to provide a library for the Strongsville High School or to choose any particular books. Once they have created such a privilege for the benefit of its students, however, neither body could place conditions on the use of the library which were related solely to the social or political tastes of school board members."[125]

In its verdict the Sixth Circuit relied extensively upon the Supreme Court's decision in Virginia State Board[126] noting that the

infringed First Amendment freedom was the "right of students to receive information which they and their teachers desire them to have."[127] In addition, it clearly adopted the marketplace concept noting that the library was a valuable resource in the free marketplace of ideas.[128]

Thus, the Sixth Circuit's position represents a radical departure from the traditional view that judicial intervention is not appropriate when a school board orders certain books banished from the library.[129] After reviewing the removal procedures used by the Board, the court found that sole basis for removing books had been the social and political tastes of the board members and that ideological considerations were inconsistent with the students' First Amendment rights.[130] Factors such as deterioration, obsolescence, and architectural necessity would have been adequate justification for removing a book.[131]

The same distinction between a local school board's discretion to order a book removed and its discretion to purchase it initially was presented in a Massachusetts case, Right to Read Defense Committee of Chelsea v. School Committee of City of Chelsea.[132] In this instance a parent objected to the language contained in a poem.[133] When the school board chairman received the parents' complaint, the chairman took the book and determined that it should be removed from the library because of the "filthy and offensive" language in the poem.[134] The school committee voted to remove the book from the library and was challenged on First Amendment grounds.

The Court acknowledged that local school committees are the principal policymaking bodies for school administration, including the

the right to select books. It further stated that there are boundaries on its authority to remove a book from a library, particularly if the removal is because it considers a book's theme and language to be offensive.[135]

The Court noted that once the school committee purchased a book, it created a constitutionally protected interest. When First Amendment values are implicated, the local officials removing the book must demonstrate some substantial and legitimate government interest.[136]

The Court in this instance adopted Minarcini's acknowledgment that there are boundaries to a board's authority to remove books. It found no contention of improper selection, obscenity, or limitations of resources such as shelf space or money. The record left no doubt that the book was banned because the committee considered the poem "filthy" and "obscene" and using Tinker it (Court) formulated a standard requiring that when First Amendment values are implicated, officials seeking to remove the book must demonstrate a substantial and legitimate government.

Savail v. Nashua Board of Education[138] involved the authority of a local school board to mandate the withdrawal of all issues of a library periodical[139] and the cancellation of future subscriptions to the periodical.

In this case the district court applied a balancing test similar to the one used in "Right to Read" to determine whether the board's "arbitrary displacement" of the contested periodical effectuated a substantial government interest. The Court could find no such interest

and enjoined the future removal of the magazine, ordered censored issues replaced, and the subscription renewed.[140]

It should also be noted that the Savail court failed to identify the First Amendment right upon which it relied.[141]

During 1980 the Seventh and Second Circuits addressed the validity of student First Amendment claims and reached divergent conclusions.[142] In addition, the Second Circuit delivered inconsistent rulings on similar sets of facts in deciding two cases on the same day.[143] The inconsistencies indicate the uncertainty that surrounds book removal issues.

The Seventh Circuit in Zykan v. Warsaw Community School Corp.[144] involved a student's challenge of a school board's right to prohibit certain textbooks, to remove certain books from the school library, and to delete certain courses from the curriculum.[145]

The plaintiffs alleged that defendant's "arbitrary and capricious" actions not only violated their "right to know" but also had infringed on their academic freedom. They further contended that the Board's disapproval of certain books stemmed not from educational concerns but from particular words in the books that offended their social, political, and moral tastes.[146]

The district court dismissed the complaint reasoning that board decisions motivated by personal beliefs did not infringe upon a constitutionally protected right of academic freedom.[147]

On appeal the Seventh Circuit affirmed the decision of the district court and, limited its inquiry to the allegation that the student's

academic freedom has been violated because of the board members' use of personal standards in evaluating the books.[148]

It should also be noted that on the appeal Judge Sharp stated, "[t]he articulation of principles at issue here is sufficiently novel and important" to merit an opportunity for the students to rewrite their claim of interference with academic freedom.[149] Consequently, to override the state interest the students had to demonstrate that the school officials were imposing an exclusive ideological orthodoxy upon them.[150]

Shortly after the Seventh Circuit ruled on Zykan, the Second Circuit rendered decisions on two book removal cases, Pico v. Island Trees Board of Education[151] and Bicknell v. Vergennes Union High School Board of Directors.[152] The same three-judge panel rendered a split decision in each with each of the judges writing a separate opinion. In each case the Court arrived at a different decision.[153]

In Bicknell the Court was asked to determine whether the administrators of a public school district may remove books from the shelves of a high school library or restrict student access to books on the basis of their personal opinions that the book is "vulgar", "obscene", or otherwise inappropriate for student readers.[154] The defendants contended that the selection and removal of library books was within the range of discretion granted to school authorities and that the exercise of that discretion does not infringe the First or Fourteenth Amendment rights of students or school employees.[155]

In ruling the Court noted:

> "In the absence of any cognizable constitutional claim it is not for this court to say whether the ultimate responsibility for the selection, acquisition and removal of books more appropriately should rest with the Board or the school librarian. We cannot assume that librarians are naturally more vigilant protectors of constitutional liberties than school board members. Nor can we accept the argument, implicitly made by plaintiffs here, that a decision to select or remove a work is constitutionally suspect when made by a school board but not suspect when based on the professional discretion or personal judgment of a library employee. There is no constitutional basis for making such a distinction."[156]

A public high schools' banning of a book which described Vietnam war accounts by American combat soldiers from the school library and all school property was preliminarily enjoined by the U.S. District Court for the District of Maine. The case, Sheck v. Baileyville School Committee, found the court stating that students and parents likely to succeed on their claim that the total ban violates the First Amendment.[157]

"While recognizing the traditional rights of parents and local school authorities in determining the effect upon students of exposure to reading material, the Court observes that the ban is not as 'minimally intrusive' on First Amendment rights as it could be."[158]

The Pico case is the most significant school library book removal case because it has been heard by the Supreme Court. Although a ruling is not expected until Summer, 1982, it is possible to review the issue from the arguments presented in the briefs.

The facts in the case are as follows. Three members of a seven-member Island Trees school board attended a conference in September, 1975, that was sponsored by a conservative organization called Parents of

New York-United.[159]

At the conference a list of books and authors considered objectionable was distributed with some editorial comments. Several of the comments were considered political in nature.[160]

Shortly thereafter the board members found several of the books on the list in their junior and senior high school libraries. At a subsequent board meeting the junior and senior high school principals were asked to remove the books. The books that were removed included:

1. The Fixer by Bernard Malamud
2. Slaughterhouse Five by Kurt Vonnegut
3. The Naked Ape by Desmond Morris
4. Down These Mean Streets by Piri Thomas
5. Best Short Stories by Negro Winters
6. Go Ask Alice - anonymous
7. A Hero Ain't Nothin' but a Sandwich by Alice Childress
8. Black Boy by Richard Wright
9. Laughing Boy by Oliver LaFarge
10. Soul on Ice by Eldridge Cleaver
11. A Reader for Writers edited by Jerome Archer[161]

The superintendent objected to the removal both in a memorandum to the board and at a public meeting. Shortly thereafter the board agreed to the formation of a committee consisting of four staff members and four parents. The committee was charged with reading the offensive books and making recommendations to the board concerning their "educational

suitability, whether they are in good taste, appropriate, and relevant." Further, there was a provision in the teacher union contract stipulating that Island Tree teachers had the right to introduce and explore controversial material provided that it was presented in "good taste, appropriate to grade level, and relevant to course content."[162]

After reviewing the committee's recommendations, the board voted to remove all of the books except Laughing Boy and Black Boy from the library. This action was contrary to the report of the committee.

To further complicate this issue a school board election was conducted during the controversy. The two incumbent school board members who were running for office were re-elected.

Following the election a lawsuit was filed by several students and their parents.

Attorneys for the defendants conducted a mail survey of this district's parents. The results of the survey revealed that 59% favored the board's action and 41% opposed it.[163]

The lower court dismissed the suit relying on the 1972 President's Council decision.[164]

The U.S. Court of Appeals for the Second Circuit reversed the decision and remanded the case to federal district court for trial.[165] The three-judge panel was split. Judge Sifton, who wrote the opinion, maintained that while the school board may have had broad authority to remove books from the library, books cannot be removed for the ideas they contain. The absence of specific criteria for removal coupled with the board's procedural irregularity in going about book removal suggests that the

school officials' concern is less to cleanse the libraries of all books containing material insulting to members of one or another religious group or which evidences an inaccurate view of the nation's history, than it is to express an official policy with regard to God and country of uncertain and indefinite content which is to be ignored by pupils, librarians, and teachers at their peril.[166]

While Judge Sifton found the board's actions "erratic, arbitrary, and free-wheeling", Judge Newman in concurring had doubts about the motives of the board in removing the books thus favoring returning the matter to the district court for a trial on the issue.[167]

Judge Mansfield dissented noting that the "effect of the majority's decision is improperly to substitute a court's view of what student curriculum is appropriate for that of the board".[168]

Following the Second Circuit decision, the Island Trees Board of Education appealed to the U.S. Supreme Court. The higher court agreed to hear the case which took place March 2, 1982.

The brief for the Petitioners, Island Trees School Board, presented four major questions. They were:

1. To what extent may a school board, acting under a state statutory duty to prescribe books to be used in its schools, be prohibited under the Constitution from removing from a school library or curriculum books which it believes to be educationally inappropriate for the school children?

2. Do secondary school students have standing under the First Amendment

to sue to compel a school board to retain on library shelves or in the curriculum books considered by the board to be educationally unsuitable as a result of application of the board members' personal moral, social, and political values?

3. In order for a board of education to constitutionally remove books from curriculum or a school library for content based reasons must it sustain a burden of proving such removal had a substantial and material basis and that it complied with specific objective criteria?

4. Does "political" motivation render unconstitutional otherwise permissible actions by a board of education in removing books from a school's curriculum and library?[169]

In presenting their argument, petitioners noted that "No teacher has been instructed not to discuss the books which were removed or to refrain from discussion or comment upon the ideas and positions they represent."[170]

Citing Epperson,[171] Cary,[172] Zykan[173] Petitioners state that "political values not only do not taint governmental action of the kind in question, but are essential to the transmission of governmental values".[174]

In a Brief for Amicus Curiae in support of Petitioners, the Citizens for Decency through Law, Inc. stated that school board's right must take precedence over the students' limited First Amendment rights. The school board has broad powers to remove books and set the curriculum as long as its actions are not for the purpose of suppressing a particular

point of view.[175] Further, the school board's removal of the books was "not a suppression of the content of speech; it was merely a restriction in the form the speech took".[176]

The National Association of Secondary School Principals in its Brief for Amicus Curiae in support of Petitioners concluded that, "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom compassion. . .The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members, and Section 1983 [Civil Rights Act of 1871] was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violation of specific constitutional guarantees. Wood v. Strickland, 420 U.S. 308, 326 (1975)."[177]

An additional Brief for Amicus Curiae was submitted in support of Petitioners by The Legal Foundation of America.[178]

The Respondents based their argument on several pertinent facts. First, the defendant's objections to the books were limited to excerpts and no effort was made to formulate an objection to the book as a whole.[179]

Second, the ban was imposed without any professional confirmation of the board members' judgments of the books. Even though the board empaneled a committee to review the books in question, it never discussed the books with the committee, received no explanation of the deliberations (from the committee), and ultimately ignored its recommendations.[180]

Third, the ban was absolute and no book could be used for any course either as optional or required reading.[181]

Lastly, the defendants never sought to determine whether any other books in the school libraries were similarly objectionable.[182]

Respondents summarized by saying, "The school board concluded that these books were objectionable because they projected values and portrayed viewpoints that were antithetical to the values and beliefs of the school officials. From the time that the school board members first learned of these books at the PONY-U conference through the events which culminated in the removal of these books from the Island Trees school libraries, defendants evinced a consistent desire to exclude ideas, thoughts, and values that were un-American, anti-Christian, anti-Semitic, and generally disagreeable."[183]

Nine Briefs of Amicus Curiae were submitted in support of Respondents. They were:

1. Brief of Amicus Curiae The Long Island Library Association Coalition[184]
2. Brief of Amicus Curiae The National Education Association[185]
3. Brief of Amicus Curiae of Anti-Defamation League of B'nai B'rith[186]
4. Brief of Amicus Curiae New York State United Teachers[187]
5. Brief of Amicus Curiae The American Federation of Labor and Congress of Industrial Organizations and for The American Federation of Teachers[188]
6. Brief of Amicus Curiae The American Jewish Congress; The American Jewish Committee; The American Ethical Union; the American

Orthopsychiatric Association; The Ethical Humanist Society of Long Island; The Long Island Council of Churches; The National Council of Jewish Women; The National Council of Teachers of English; The Office of Communication; United Church of Christ; The Pilgrim Press; United Church Board for Homeland Ministries; The Speech Communication Association; The Student Press Law Center; The Union of American Hebrew Congregations; and The Unitarian Universalist Association.[189]

7. Brief of Amicus Curiae The Authors League of America Inc.[190]
8. Brief of Amicus Curiae Association of American Publishers, Inc.; American Booksellers Association, Inc.; American Society of Journalists and Authors, Inc.; Council for Periodical Distributors Associations; Independent Literary Agents Association, Inc.; International Periodical Distributors Association, Inc.; National Association of College Stores, Inc.; and Writers Guild of America, East, Inc.[191]
9. Brief of Amicus Curiae P.E.N. American Center[192]

III. CONCLUSION

Pico v. Island Trees Board of Education was the first time the U.S. Supreme Court was confronted with the question of whether a public school board can remove books that it finds objectionable from junior and senior high school libraries. Based on previous cases it would appear that the most equitable and efficient approach to the book removal controversy

involves the balancing of the student's right to receive information and school board's right to select curricular materials free from judicial intervention.

While Tinker afforded First Amendment rights to students, it would seem inappropriate to apply Tinker to book removal. First, Tinker resulted from a school board's action to suppress a first amendment expression (demonstration). Unlike Tinker, the removal of books from a school library is a school board responsibility, if in fact it is a school board responsibility to select them.

It would create administrative havoc for public schools to constantly be scrutinized by the courts for every curricular selection. If Pico can prove that the school board was depriving students of a legitimate "right to know" there may be substance to the argument. On its face, however, there does not seem to be evidence to support that claim. In fact, teachers were not told they could not discuss the books.

Another issue in book removal is the "pall of orthodoxy" concept. Generally school boards are elected therefore it would be difficult to elect a unanimous board that knowingly cast the "pall of orthodoxy" over the curriculum. If this were to happen and could be proven, the deprivation of a student's First Amendment rights might hold.

The selection of books should be the central issue in this matter. Pico is complicated because the Board purchased the books and then ordered their removal. This might be an action that crosses the student First Amendment rights protection. (See Minarcini v. Strongsville)

Secondly, when a representative committee of the staff and community was selected (in Pico) to review the books in question, the board chose not to affirm its (the Committee) recommendations. This action may have legitimatized Respondent's complaint that the removal was based on board members' personal and political views.

In conclusion, it would seem that when balancing the First Amendment rights of students with the responsibilities by law of the school board that the board has the right to order and remove curricular materials.

In addition it would seem appropriate for school boards to establish specific procedures for ordering and handling complaints about library materials.

FOOTNOTES

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